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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 435

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

POOL MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the order of the Court of Appeals for the Fifth Circuit, entered on May 13, 1949, deferring action on the Board's motion for the summary entry of a decree and remanding this case to the Board with directions to take evidence and report on questions concerning compliance by the employer, Pool Manufacturing Company, with the Board's order.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R.

31-50) are reported in 70 N. L. R. B. 540. The *per curiam* opinion of the Court of Appeals (R. 66) is reported in 24 L. R. R. M. 2147.

JURISDICTION

The order of the Court of Appeals was entered on May 13, 1949 (R. 67). The Board's petition for rehearing was denied on June 16, 1949 (R. 67-73). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 74). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether questions concerning subsequent compliance by an employer with an order of the National Labor Relations Board may properly be considered by a court of appeals in connection with a petition by the Board to enforce its order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

Pursuant to charges filed by United Garment Workers of America, affiliated with the American

Federation of Labor, herein called the Union (R. 28-29), the Board, on April 10, 1946, issued a complaint against Pool Manufacturing Company, herein called the Company, alleging that the Company had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act (R. 24-28). A hearing on the complaint was held before a trial examiner, who, thereafter, on June 25, 1946, issued his intermediate report, finding that the Company, in violation of Section 8(1) and (5) of the Act, had refused to bargain with the Union which had been certified by the Board as the employees' bargaining representative; that such refusal to bargain had caused and prolonged a strike among the Company's employees; and that during the strike the Company had engaged in various acts and conduct interfering with the exercise of the rights guaranteed its employees under Section 7 of the Act, including threats of loss of their jobs if they failed to abandon the strike immediately (R. 33-50). To remedy these unfair labor practices, the trial examiner recommended that the Company cease and desist therefrom; upon request, bargain with the Union; offer the striking employees reinstatement to their former or substantially equivalent positions with back pay from the date of the Company's refusal to reinstate them; and post appropriate notices (R. 50-55).

On June 28, 1946, the Board entered an order transferring the case to the Board, and on the same

date a copy of said order and of the intermediate report were duly served upon the Company (R. 30, 56). The Company at no time thereafter filed any exceptions to the intermediate report as permitted by Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended (8 Fed. Reg. 16047, 16051, Section 202.33) then in effect.[1] On August 26, 1946, pursuant to the provisions of Section 35 of Article II of the Rules and Regulations of the Board (8 Fed. Reg. 16047, 16051, Section 202.35),[2] the Board issued its order adopting the findings, conclusions and recommended order set forth in the intermediate report (R. 31-33).

On February 9, 1949, the Board filed its petition

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[1] The pertinent provisions of Section 33 read as follows: "Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *

"No matter not included in a statement of Exceptions may thereafter be objected to before the Board, and failure to file a statement of Exceptions shall operate as a submission of the case to the Board on the record."

[2] Section 35 provides that: "Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon compliance with the recommendations of the Intermediate Report, or may make other disposition of the case."

for enforcement in the court below (R. 1-6) and thereafter filed a certified transcript of the record (R. 55-56). On April 18, 1949, the Board also filed in the court below its motion for the summary entry of a decree to enforce its order, alleging that in view of Section 33 of the Board's Rules, above mentioned, and of Section 10(e) of that Act, as amended, which provides that no objection which has not been urged before the Board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances, the Company's failure to file exceptions to the trial examiner's findings and recommended order constituted a waiver of all objections to the order of the Board and that no contestable issue was before the court (R. 56-58). In response to the Board's petition, the Company, on April 18, 1949, filed a motion to remand the case to the Board for the purpose of adducing additional evidence to show that the Company had complied at least in part with the provisions of the Board's order of August 26, 1946; that, after bargaining with the Union, the parties had been unable to reach an agreement; that the Union has not bargained in good faith; and that the Union may not now represent a majority of its employees (R. 59-61).

The Board, on May 3, 1949, filed its opposition to the Company's motion to remand (R. 62-65). On May 13, 1949, the court below entered its order deferring action on the Board's motion for sum-

mary judgment and remanding the case to the Board with directions to take evidence and report (1) whether and to what extent the Company has complied with the Board's order; (2) whether and why, if the order has been complied with, the matter should not be dismissed as moot; and (3) if the matter is not moot, what recommendations or requests the Board has to make in the premises (R. 67). On June 3, 1949, the Board filed its petition for rehearing (R. 67-73) which the court below denied on June 16, 1949 (R. 73).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deferring action on the Board's motion for the summary entry of a decree upon the transcript of the record.

2. In remanding the case to the Board with directions to take evidence and report to it on questions concerning compliance with the Board's order.

3. In failing to grant the Board's motion for summary entry of a decree upon the transcript of the record.

REASONS FOR GRANTING THE WRIT

This is one of the five cases which, as is set forth in the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, pp. 10-23, filed contemporaneously, the Board has selected as vehicles for

bringing before this Court its difficulties in securing enforcement of its orders in the Fifth Circuit. In *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, decided on June 3, 1949, in which we have simultaneously herewith filed a petition for a writ of certiorari, the court below entered an order identical with that here involved. In our petition in that case we have pointed out that the action of the court below in remanding the case to the Board with directions to take evidence and report on questions concerning compliance with the Board's order was contrary to the controlling decisions of this Court and in conflict with the decisions of all the other courts of appeals which have passed on that question. We have pointed out further that such action is contrary to the clear Congressional intent and that it seriously jeopardizes the effective administration of the Act. Since the question involved in this case is precisely the same as that involved in the *Mexia* case, we respectfully refer the Court to the reasons for granting the writ which are set forth in our petition in that case.

CONCLUSION

For the reasons stated in the *Mexia* petition, we respectfully submit that this petition for a writ of certiorari should be granted and that the order entered by the court below on May 13, 1949, should be reversed without oral argument and the case remanded to the court below with directions to enter a decree enforcing the Board's order as re-

quested in the Board's petition for enforcement and in its motion for the summary entry of a decree.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

OCTOBER 1949.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Sec. 141, *et seq.*) are as follows:

* * * * * * *

SEC. 10. * * *

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board,

its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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